BEFORE THE
UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

NATIONAL HEARING TO CONSIDER POSSIBLE CHANGES IN THE FEDERAL MILK MARKETING ORDER PROGRAM	Docket No. AO-14-A64 ETC. DA-90-017

MOTION OF THE DEPARTMENT OF JUSTICE TO DIRECT THE PRESIDING OFFICER TO PERMIT THE DEPARTMENT OF JUSTICE TO PARTICIPATE IN THE NATIONAL MILK MARKETING HEARINGS

By a notice dated April 3, 1990, the United States Department of Agriculture ("USDA") announced that it would hold a national hearing to consider possible changes in the Federal milk marketing order program, and invited interested parties to submit proposals for possible inclusion in a hearing notice. 55 Fed. Reg. 12369 (1990). On May 31, 1990, the Department of Justice ("Department") became a party to these proceedings, submitting Comments to the USDA setting forth four proposals for inclusion in the hearing. Three of these proposals were accepted for inclusion in the subsequent Notice of Public Hearing on Proposed Rulemaking. 55 Fed. Reg. 29035 (1990). The Department appealed the exclusion of its fourth proposal, to which the USDA responded in an August 13, 1990 letter from Administrator Haley to Assistant Attorney General Rill:

> It appears that the thrust of the three proposals that were noticed is to move towards elimination of price regulation under the orders. Therefore, we would expect your testimony at the hearing in support of your proposals to include the basic purpose of the proposals. We have informed the administrative law judge who will preside at the hearing that we believe that it would be appropriate to receive testimony concerning elimination of pricing under the program in connection with the proposals that were noticed. (Emphasis added.)

In August, 1990, the Department asked that its witness be scheduled to testify on September 17, 1990, at the Minneapolis session of the hearings. The Department's request, and the ultimate scheduling of the Department's witness on that date, was designed to meet USDA's "expect[ation] that those witnesses representing . . . large government agencies will present the main thrust of their testimony at the longer sessions of the hearing . . . ." 55 Fed. Reg. 29034 (1990).

On the date the Department's witness had been scheduled to testify, September 17, the presiding officer announced that the Department did not have "authority" to participate in the proceedings, thus precluding it from offering a witness in support of its proposals. Moreover, the presiding officer prohibited the Department from cross-examining any witness offered by any other party. The matter was then certified by

the presiding officer to the USDA Judicial Officer, and the Department was given until 12:00 noon on September 19 to file this Motion.

The Department indisputably is a party in this rulemaking proceeding. An "agency" expressly can be a "party" under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(3), and as a party, the Department is entitled to participate in a rulemaking or adjudicatory hearing. 5 U.S.C. § 556(d). Nothing in the USDA's hearing notice suggests any departure from such established procedure. Indeed, the hearing notice makes repeated reference to the participation of "interested parties" in this proceeding, and specifically includes the Department as a proponent of three proposals to be considered at the hearing. 55 Fed. Reg. 29035 (1990).

Despite USDA's decision, consistent with the APA, to include in the hearings all interested parties, including the Department, the presiding officer ruled that USDA lacks the legal authority to include the Department of Justice as a party to this proceeding. The effect of this ruling is to deny participation in this hearing by the Executive Branch agency charged with the responsibility of fostering competition and efficiency in the economy through participation in proceedings

before regulatory agencies.1/ The basis for this ruling is an awkward and narrow reading by the presiding officer of Section 900.8(b)(1) of the United States Department of Agriculture Rules of Practice ("Rules of Practice") that creates a needless conflict with the APA.

Section 900.8(b)(1) of the Rules of Practice provide that "[a]t the hearing, any interested person shall be given an opportunity to appear, . . . and to be heard with respect to matters relevant and material to the proceeding." The term, "interested person," is not defined in the Rules of Practice. However, borrowing from the APA, which does not include a federal agency in its definition of a person, 5 U.S.C. § 551(2), the presiding officer narrowly interpreted the term as used in the Rules of Practice to preclude the appearance of the Department of Justice. USDA, however, cannot contravene the APA by issuing inconsistent regulations and there is nothing in the Rules of Practice that indicates that USDA intended to do so. This section may not, therefore, be read to limit parties that may appear.

1/ The functions of the Antitrust Division of the Department of Justice include "Intervention or participation before administrative agencies functioning wholly or partly under regulatory statutes in administrative proceedings which require consideration of the antitrust laws or competitive policies. . . ." 28 CFR §0.40. Administrative proceedings which set the price for agricultural commodities clearly require consideration of competitive policies.

Finally, other parties at the hearing objected to the Department's participation on the basis of two Supreme Court cases, S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972) and Secretary of Agriculture v. United States, 647 U.S. 645 (1954). Neither case supports exclusion of the Department.

In S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972) the Court held that the Wunderlich Act, which deals with fraud by government contractors, does not authorize the Department of Justice to appeal a decision of the Atomic Energy Commission. S&E Contractors concerned the right of judicial appeal by the Department. This case had nothing to do with the right of the Department to appear in an administrative hearing, and thus provides no support for exclusion of the Department from these proceedings.

The second case, Secretary of Agriculture v. United States, 647 U.S. 645 (1954), is equally inapposite. It concerned an appeal by the Secretary of Agriculture of a decision by the Interstate Commerce Commission concerning rates for unloading services performed by railroads transporting fruits and vegetables. The statute involved in that case specifically authorized the Secretary of Agriculture to appear before the ICC. The fact, however, that the Agricultural Adjustment Act names the Secretary of Agriculture as an authorized party in such ICC proceedings does not in any way limit the ability of the Department of Justice to appear as a party before the USDA.

Indeed, other "interested parties" participated in the very ICC proceedings cited as precedent to exclude the Department as an "interested party" here.

For the above reasons the Department requests that the USDA direct the presiding officer to permit the Department of Justice to present testimony and engage in cross-examination of other parties' witnesses. The Department also requests an opportunity to cross-examine those witnesses who have been shielded by the presiding officer's order from cross-examination by the Department.

Respectfully submitted,

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